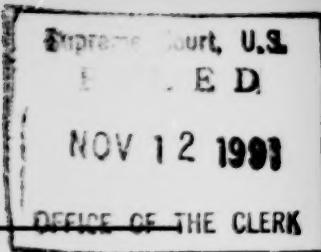


81-800

No. _____



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CUMBERLAND & OHIO CO.
OF TEXAS, INC., *Petitioner*

v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Counsel of Record:

Alfred H. Knight
Willis & Knight
215 Second Avenue, North
Nashville, Tennessee 37201
(615) 259-9600

Counsel for Petitioner:

John I. Harris III
Nader Baydoun & Associates
Suite 600
49 Music Square West
Nashville, Tennessee 37203
(615) 321-3800

QUESTION PRESENTED

When a party to a diversity appeal moves to certify a state law question to a state court of last resort, should a "rule of deference" be applied by the federal Court of Appeals, which either requires the Court of Appeals to:

1. Certify the issue, if the applicable state law is uncertain and there is a difference of opinion as to the applicable state law principle either within the Court of Appeals panel or between the Court of Appeals judges and the district court judge; or
2. Apply enumerated factors in determining whether to certify the issue, including, but not necessarily limited to, the following: Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Cumberland & Ohio Co. of Texas, Inc., the successor corporation of Herbert Materials, Inc., and the respondent, First American National Bank.

Petitioner, Cumberland & Ohio Co. of Texas, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to the requirements of Rule 29.1. of the Supreme Court Rules.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CUMBERLAND & OHIO CO.
OF TEXAS, INC., *Petitioner*

v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, Cumberland & Ohio Co. of Texas, Inc., ("Cumberland & Ohio") prays that a writ of certiorari issue to review the orders, judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 936 F.2d 846, and is reprinted in the appendix hereto at page 1a.¹

The judgment of the trial court has not been reported. It is reproduced in the appendix hereto at page 12a.

¹ References to items contained in the appendix are set forth in this format.

JURISDICTION

Cumberland & Ohio filed this action in the Tennessee Chancery Court, Davidson County. Respondent, First American, removed the case to the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1332, diversity of citizenship. The jury returned a \$6 million verdict for Cumberland & Ohio and judgment was entered in that amount on October 2, 1989. First American's post-trial motion for entry of a judgment notwithstanding the verdict was denied.

On First American's appeal, the Sixth Circuit on June 12, 1991, reversed the District Court's orders and directed that judgment be entered in favor of First American. Appendix page 9a. Cumberland & Ohio's timely petition for rehearing and suggestion for rehearing *en banc* were denied on August 14, 1991. Appendix page 11a. Joined with Cumberland & Ohio's petition for rehearing was a motion to certify the state law issues to the Tennessee Supreme Court which was denied on July 23, 1991. Appendix page 10a.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Tenn. Code Ann. § 28-3-105. (1980)

Property tort actions - Statutory Liabilities - Alienation of affections. - The following actions shall be commenced within three (3) years from the accruing of the cause of action:

- (1) Actions for injuries to personal or real property;
- (2) Actions for the detention or conversion of personal property;
- (3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability;
- (4) Actions for alienation of affections.

Tenn. Code Ann. § 28-3-109. (1980)

Rent - Official Misconduct - Contracts not otherwise covered - Title Insurance - Demand Notes. - (a) The following actions shall be commenced within six (6) years after the cause of action accrued:

- (1) Actions for the use and occupation of land and for rent;

- (2) Actions against the sureties of guardians, executors and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; and
- (3) Actions on contracts not otherwise expressly provided for.
 - (b) The cause of action on title insurance policies, guaranteeing title to real estate, shall accrue on the date the loss or damage insured or guaranteed against is sustained.
 - (c) The cause of action on demand notes shall be commenced within ten (10) years after the cause of action accrued.

STATEMENT OF THE CASE

Petitioner, Cumberland & Ohio, is the successor corporation to Herbert Materials, Inc., which was originally chartered in 1867 and continually operated in Nashville, Tennessee until 1983. In 1981 it entered into a \$2.5 million working capital loan with First American. In August, 1988, Cumberland & Ohio, which was then a Texas corporation, filed this civil action in the Chancery Court for the State of Tennessee in Davidson County, Tennessee. First American removed the case to the United States District Court for the Middle District of Tennessee on diversity grounds, under the provisions of 28 U.S.C. § 1332.

The complaint asserted that First American had breached its contractual obligations to Cumberland & Ohio by failing to fund and wrongfully accelerating a working capital loan and the company's term loans; by failing to perform its contractual obligations in good faith; and by failing to give notice of a substantial change in the banking relationship. It was alleged that as a result of First American's breach of its contractual duties, the company sustained operational losses, and was forced to dispose of assets at below market prices.

In its answer, in the pre-trial order, and during the trial, First American asserted that Cumberland & Ohio's claims were barred by the Tennessee statutes of limitation. It filed a trial brief and a motion in limine, asserting its position on the statute of limitation issue.

The district court took the statute of limitation issue under advisement at the inception of the trial. At the close of the plaintiff's proof, First American moved for a directed verdict, asserting that all claims were barred by Tennessee's three-year statute of limitations, applicable to claims for injury to property. The Court denied the motion, holding that Tennessee's six-year statute of limitations for breach of contract claims was

applicable. Relevant portions of the district court's memorandum opinion on the statute of limitations are as follows:

1. The district court reviewed prior Tennessee decisions, and concluded that Tennessee courts have previously applied the three year "injury to property" statute of limitations only when the claim was founded in tort and the damages at issue were injuries to property. Appendix page 13a.

2. The district court also found that the plaintiff's claims were governed by the six year breach of contract statute of limitation, because they were breach of contract claims, not involving injury to property.

In the present case, the plaintiff has alleged that it incurred monetary losses in selling its inventory and assets at below market price. Plaintiff has not alleged that the defendant injured its property, but that defendant's actions forced plaintiff to suffer operating losses and to sell its property under such time pressures that plaintiff received less money than it would have otherwise received for the sale. The inherent value of the property remained the same. As the Court of Appeals found under similar circumstances in Harvest Corporation [Harvest Corporation v. Ernst & Whinney, 610 S.W.2d 727 (Tenn. Cert. App. 1980), perm. app. denied (Tenn. 1980), pet. hear. denied (Tenn. 1981)], "such money damages do not constitute damage to property."

The Court also finds that plaintiff has presented claims lying in contract and not tort. Plaintiff's losses are alleged to have resulted from the defendant's allegedly bad faith performance of the contract. Plaintiff has not sought to recover on the ground that defendant's bad faith amounted to conspiracy or fraud, but that defendant's performance breached the contract's implied covenant of good faith. Accordingly, the Court finds that these claims are thus governed by the six year statute of limitations prescribed in Tennessee Code section 28-3-109.

Appendix page 14a.

The jury returned a verdict in favor of the plaintiff in the amount of \$6,000,000, which was entered as the judgment of the Court.

In its post-trial motion for entry of a judgment notwithstanding the jury's verdict, First American reasserted the statute of limitations defense. It also argued, for the first time, the affirmative defense that judgment should not have been entered against it because Cumberland & Ohio had

failed to repudiate a release that it had executed under duress in 1983. Each of these issues was briefed by the parties. The district court denied the bank's post-trial motion.

First American appealed to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291. The bank renewed its argument on the statute of limitations, and again asserted its untimely argument regarding the repudiation of the lease. The Sixth Circuit addressed both of these state law questions in its opinion, disagreeing with the district court on each of them, and reversing the judgment for the plaintiff.

In its discussion of the statute of limitations issue, the Sixth Circuit rejected the district court's analysis of the decision in Harvest Corporation v. Ernst & Whinney, 610 S.W.2d 727 (Tenn. Ct. App. 727). Instead, the Court of Appeals adopted the reasoning of a Seventh Circuit opinion, which had attempted to predict the position the Tennessee Supreme Court would take if confronted with similar facts:

We agree with the Seventh Circuit that Tennessee's highest court would impose a three year limitations period on such economic duress claims, where the plaintiff seeks damages for alleged injuries to property.

936 F.2d at 849; Appendix page 7. (emphasis added).

As a separate basis for reversal, the Court of Appeals held that, as a matter of Tennessee law, a release that is executed under economic duress is voidable, not void, and that Cumberland & Ohio had therefore failed to timely repudiate the 1983 release. The Court of Appeals did not refer to Tennessee case law holding that repudiation is an affirmative defense, or to the obvious untimeliness of First American's assertion of that defense.

Cumberland & Ohio subsequently filed a petition for rehearing, a suggestion for rehearing *en banc*, and a motion to certify both of the state law issues to the Tennessee Supreme Court pursuant to Rule 23 of the Tennessee Supreme Court Rules. Appendix page 16a. The Sixth Circuit denied the motion to certify on July 22, 1991, and denied the petition for rehearing on August 14, 1991. Appendix pages 10a and 11a.

REASONS FOR GRANTING THE WRIT

Summary of the Petitioner's Contention

The purpose of this petition is to request this Court to re-examine the policy relating to granting motions to certify state law questions in diversity cases. The certification procedures now in effect in more than

forty states provide an effective and relatively inexpensive means of ensuring consistent and accurate application of state law principles in federal diversity actions, but the use of these procedures obviously requires state and federal cooperation. Although the acceptance of certification is within the discretion of the state court of last resort, the opportunity to exercise this discretion is dependent upon whether the federal appellate courts decide to afford that opportunity. As this case illustrates, that opportunity may be denied when objective considerations indicate it should be extended, and may, indeed, be denied for any reason or no reason. In the past, this Court has attempted to encourage certification by federal appellate courts, while expressing reluctance to infringe upon their complete discretion to deny it. The petitioner respectfully submits that the time has come to provide at least directional assistance for the Court of Appeals with regard to certification, so that the desirable purpose of certification procedures can be more fully effectuated, and the policies underlying Erie Railroad v. Tompkins, 304 U.S. 64 (1938) more fully realized.

Argument

When a party to an appeal moves to certify a state law question to a state court of last resort, a "rule of deference" should be applied, which either requires the Court of Appeals to:

1. Certify the issue, if the applicable state law is uncertain and there is a difference of opinion as to the applicable state law principle either within the Court of Appeals panel or between the Court of Appeals judges and the district court judge; or

2. Apply enumerated factors in determining whether to certify the issue, including, but not necessarily limited to, the following: Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

The twin policies underlying the decision in Erie Railroad v. Tompkins 304 U.S. 64 (1938) was to discourage forum shopping as between state and federal courts, and to ensure that removal of actions to federal court will not substantially affect enforcement of rights granted by

the state. Guaranty Trust Company v. York, 326 U.S. 99 at 109 (1945); Hannah v. Plummer, 380 U.S. 460, 468 (1965). These policies are relatively easy to implement when the applicable state law is clear and settled. Implementation becomes less easy as state law becomes less clear and more subject to the interpretation of individual judges. When, as in this case, state law is so uncertain as to require an outright prediction as to what the state court of last resort would rule under the circumstances, the Erie policies may become a mirage.

In the present case, for example, the Sixth Circuit Court rejected the analysis of a district judge who had substantial experience as a Tennessee state judge, disagreed with his interpretation of a Tennessee Court of Appeals' decision which was on point, and instead adopted the prediction of a Seventh Circuit opinion as to what the ruling of the Tennessee Supreme Court would be under the circumstances of the case. Such reasoning comes close to a reversion to pre-Erie federal common law analysis.

While involving a less generally applicable principle of Tennessee law, the Appellate Court's ruling on the "failure to repudiate" issue is an even more serious co-option of Tennessee's ability to define its own law. Under Tennessee law, the failure to repudiate a contract entered into under duress is a form of estoppel, and therefore, an affirmative defense which must be expressly asserted prior to trial, and certainly prior to judgment. Exum v. Washington Fire & Marine Ins. Co., 297 S.W.2d 805, 41 Tenn. App. 610 (Tenn. Ct. App. 1955), cert. denied (Tenn. 1956). By applying this defense at the appellate level, despite the defendant's clear failure to timely assert it at the trial level, the Court of Appeals has effectively held that it was not an affirmative defense. By declining to certify the issue to the Tennessee Supreme Court, the Court of Appeals denied the Tennessee Supreme Court the opportunity to reassert its own prior law, or to redefine its law if deemed appropriate.

Whatever analysis is made of the Sixth Circuit's denial of certification in the present case, it undeniably promotes state-federal forum shopping. Defendants in similar future cases will undoubtedly file removal petitions in order to ensure application of the three year statute of limitations, rather than risking state law application of the six year limitation, or to avoid strict definition of state law affirmative defenses. The Sixth Circuit's decision also potentially deprives the present petitioner of the benefit of a state right which, but for the accident of diversity jurisdiction, would have been granted it. If the Tennessee Supreme Court adopts the six year limitation in a future case similar in its facts to the present case, the failure of the Erie policy in this case will be apparent.

However, the above difficulties can be and should have been remedied without creating new ones, through the simple device of requiring deference to state certification procedures. If the Court of Appeals had granted the motion to certify in the present case, the Tennessee Supreme Court would have been given an opportunity to settle an admittedly unsettled and important principle of state law. It might have declined to do so, but merely giving it the opportunity would have partially satisfied the Erie policies. Instead, while recognizing that the Tennessee Supreme Court has not spoken clearly on the issue, the Sixth Circuit Court chose to speculate as to what that Court would do under the circumstances, relying upon other federal precedent.

This Court has in the past recognized the importance and efficacy of state certification procedures in resolving unsettled state law issues. In Lehman Brothers v. Schein, 416 U.S. 386 (1974), the Court remanded a case to the appellate court when the appellate court had denied certification, despite an absence of applicable state law. Although this Court was careful to state that certification remained a matter of "sound" Court of Appeal's discretion, the intent of Lehman was clearly to encourage the use of the certification procedure in order to accurately apply state law. Likewise, in Bellotti v. Baird, 428 U.S. 132 (1976), this Court indicated that certification will be required when a state law interpretation is necessary as a predicate for determining the constitutionality of a state statute. While this Court has been understandably reluctant to require certification -- likening it, for example, to prescribing what legal research the circuit courts shall conduct -- the only objective factor the Court has been able to identify justifying the denial of certification of an unsettled state law issue is the cost of certification. See, Lehman Brothers v. Schein, supra.

The need for more effective use of the available certification procedures has become more apparent since the decision of this Court in Salve Regina College v. Russell, 111 S. Ct. 121 (1991). The issue presented in Salve Regina College was whether the Courts of Appeal should continue to apply a "rule of deference" to their review of district court determinations of state law in diversity cases arising within the state in which the district court sits. The majority of the Courts of Appeal, including the Sixth Circuit, had adopted such a rule, on the premise that district judges in such circumstances were more likely to be versed in the applicable state law than the Courts of Appeal judges, who did not deal with it on a day-to-day basis. See e.g., Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) re'hng denied (1989).

However, this Court rejected the rule of deference, finding that it contravened important practical and policy considerations. This Court held

that Courts of Appeal must review state law issues in diversity cases *de novo*, and with the same independence as in their review of district court determinations of federal law. This Court reasoned that an appellate court was better equipped to make a comprehensive, probing examination of legal issues than a district court which was subjected to the day-to-day pressures of litigation. This Court further concluded that continued deference to district court decisions would tend to fracture interpretations of state law, on a district-by-district basis, in direct contravention of the Erie policy. Significantly, with respect to those instances where there is a divergence between the district court and the federal appellate court, the Court noted in footnote 4:

Of course, a question of state law usually can be resolved definitively ... if a certification procedure is available and is successfully utilized.

Salve Regina College, 111 S.Ct. at 1224.

The petitioner respectfully submits that the second shoe should now be dropped. Having rejected the rule of deference to district court interpretations of state law, and having transferred full responsibility for making such interpretations to the Courts of Appeal, this Court should now complete the implementation of the Erie policies, by adopting a rule requiring or encouraging Courts of Appeal to defer to the ultimate repositories of state law, the state courts of last resort, when they are requested to do so and when factors justifying state certification are present. Every reason exists for adopting such a rule, and there appears to be no apparent reason for not doing so.

The petitioner suggests two approaches to enhancing the efficacy of state law certification procedures. The first is a per se approach, which would require certification whenever a request is made, if the Court of Appeals finds that state law is so uncertain as to require a prediction as to what the state court of last resort would do under the circumstances, and if that uncertainty is manifested by a disagreement between the Court of Appeals judges and the district judge or between members of the Court of Appeals panel on the issue involved. Such a rule would have the advantage of requiring certification only when state law is truly unsettled, and Erie policies truly at risk, while leaving certification in the broad range of more routine cases to the "sound discretion" of the circuit courts. Since certification would require a crucial finding by the Court of Appeals, going to the essential need for state law interpretation, control of certification would still remain within the Court of Appeals. The only purpose of the rule would be to prevent the essentially irrational result of a federal court of appeals denying certification, despite its admission that existing state law

is ambiguous, and despite a demonstration of that ambiguity by a division of opinion among the federal judges involved. The benefits of such a rule are obvious, and it is difficult to see what its deficiencies might be.

A more deferential approach would be the "factors to be considered" analysis which the petitioner suggests as an alternative. Such an analysis would not impinge at all upon the discretion of the federal court of appeals, but would provide needed guidance for the uniform application of the certification procedures throughout the United States. The factors which the petitioner has suggested are taken from previous pronouncements of this court, and include: the degree to which existing state law is unsettled; whether that uncertainty is reflected in disagreements among the federal judges who are and have been called upon to decide the instant case; whether the district judge whose determination is disagreed with has experience (as the present district judge did) as a state court judge; and whether the additional cost of certification is significant as compared to the value of the judgment being reviewed (in this case, it obviously is not).

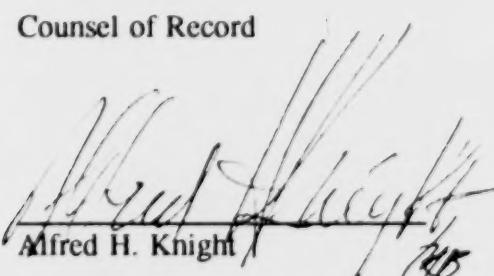
While the petitioner believes that the per se rule would be preferable, either would enhance the beneficial policies of state certification procedures and would minimize the possibility that the Erie principles would be abrogated. In the absence of such a rule, state supreme courts will continue to be denied full opportunity to shape and define the law applicable to federal diversity cases, as intended by the decision in Erie Railroad v. Tompkins.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted:

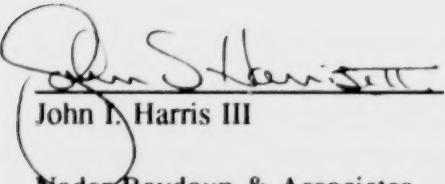
Counsel of Record


Alfred H. Knight

Willis & Knight

215 Second Avenue, North
Nashville, Tennessee 37201
(615) 259-9600

Counsel for Petitioner



John I. Harris III

Nader Baydoun & Associates
Suite 600
49 Music Square West
Nashville, Tennessee 37203
(615) 321-3800

APPENDIX

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No. 90-5295

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**CUMBERLAND & OHIO CO. OF
TEXAS, INC., the successor
corporation of Herbert Materials,
Inc.,**

Plaintiff-Appellee,

v.

**FIRST AMERICAN NATIONAL
BANK,**

Defendant-Appellant.

ON APPEAL from the
United States District
Court for the Middle
District of Tennessee

Decided and Filed June 12, 1991

Before: KENNEDY and MARTIN, Circuit Judges; and
ENGEL, Senior Circuit Judge.

ENGEL, Senior Circuit Judge. First American National Bank ("the Bank") appeals a jury verdict rendered against it in this contract action. The plaintiff-appellee is Cumberland & Ohio Co. of Texas, ("the Company") which was known as Herbert Materials, Inc. at the time it contracted with the Bank. The Company's complaint raised claims based upon fraudulent and negligent misrepresentation, breach of contract, and

breach of fiduciary duty under Tennessee law. The case was tried before a jury in September 1989, and a \$6 million judgment was entered in favor of the Company. We now reverse the judgment, concluding that the statute of limitations had run on all of the Company's claims. In addition, we find that the Company had executed a valid waiver and release in favor of the Bank, precluding the Company's suit even had the action been timely filed.

The Company, which was based in Nashville, manufactured and sold bricks and building materials. In 1981, the Company established a \$2.5 million working capital loan or line of credit with the Bank. Such loans are generally extended to borrowers who lack liquid assets, and they are usually made in the form of demand notes secured by the borrower's inventory and accounts receivable. At the time, the Company's overall debt exceeded \$10 million, and the Bank asked for and received significant power to control the future business plans of the Company, apparently in order to ensure that the Company would survive and continue to meet its financial obligations to the Bank.

Among the changes the Bank sought in the Company's operation was the disposition of some of the Company's unprofitable divisions. The Company contends that it planned to sell off some of its assets, but not as quickly as the Bank wanted. Lending contracts signed by the Bank and the Company in July and August of 1981 gave the Bank the right to demand immediate and full payment of the \$2.5 million loan and all other loans between the parties if the Company missed a payment or if the "Bank reasonably deem[ed] itself to be insecure" regarding the Company's ability to repay the loans. The documents also state that "All amounts advanced to Borrower are payable ON DEMAND." Any right of the Company to notice before the Bank demanded payment was "expressly waived." There was also a provision indicating that "in the absence of default, no demand for full payment of the Accounts Receivable and Inventory Loans will be made

on or before thirteen months from the date of the Master Loan Agreement."

In late September 1982, after the 13-month period had run, the Bank sent a letter to the Company expressing its view that the Company was in default as defined in the loan agreement, and that the entire amount was then due. The Bank was not satisfied that the Company had reduced its inventory and assets to the extent required under the parties' loan agreement. The Bank also concluded that the Company had failed to secure sufficient additional capital for ongoing operations.

The Company disputed the Bank's allegations of default. Further negotiations between the parties resulted in a resumption of the line of credit to the Company in October 1982, provided the Company would obtain additional capital by the end of the year and would continue to sell some of its property and affiliates.

The Company indicated in early 1983 that it was considering legal action against the Bank for the Bank's 1982 demand for full payment. The Company believed the Bank was letting it "bleed to death" by limiting its access to additional working capital, and by holding liens on the Company's collateral, whereas the Bank thought its actions were justified to ensure that the loans remained sufficiently collateralized and that the Company survive.

In January 1983, the Company asked that the collateral be released so that the working capital loan could be removed to another bank. Further discussions between the Company and the Bank led to the Bank's agreement to make a further loan to the Company in exchange for the Company's agreement to sell more property and to assign some notes payable to the Bank. In addition, the Bank sought a "waiver and release" from the Company which would release the Bank from any liability which the Company claimed the Bank owed for "breaching" the working capital loan agreement in 1982 by demanding immediate full payment of the loan. After several more

months of discussions within the Company's board of directors and with the Bank, the Waiver and Release was signed by the Company and its shareholders in July 1983. It absolved the Bank from any liability whatsoever arising out of transactions made before that date. A similar release in favor of the Company was signed by the Bank at the same time. After the releases were signed, the Company transferred its line of credit to another bank, paid off the loans owed to the Bank, and terminated its relationship with the Bank in 1983.

In August 1988, the Company filed suit against the Bank in Tennessee Chancery Court, and the action was removed to federal court in September 1988. The Company claimed that it suffered losses of between \$5 million and \$7 million because the Bank's "financial pressures and arbitrary deadlines" forced the Company to sell off valuable assets at deep discounts. The Company alleged that it signed the Waiver and Release under economic duress because purchasers of the Company's assets wanted the Bank's liens removed, and the Bank would only remove them after the Company signed the Waiver. The jury awarded the Company \$6 million, and the Bank filed a timely notice of appeal.

I.

This court must review *de novo* the district court's determinations of state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1221 (1991). The parties agree that Tennessee law applies to the contracts and actions at issue before us. The district court determined that a six-year statute of limitations period applied, so that the Company's suit, initiated five years after the alleged breaches of contractual and fiduciary duties, was timely. We disagree.

Tennessee's statute of limitations period is three years for injuries to personal or real property. Tenn. Code Ann. (T.C.A.) § 28-3-105. The six-year limitations period applies to "actions on contracts not otherwise

expressly provided for" in the Tennessee code. T.C.A. § 28-3-109. The three-year limitations period applies when a defendant has allegedly breached his contract, causing injury to the personal or real property of the plaintiff. *See Pera v. Kroger Co.*, 674 S.W.2d 715, 719-20 (Tenn. 1984).

The distinctions between Tennessee's three- and six-year limitations periods are illustrated in *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977) and *Harvest Corp. v. Ernst & Whinney*, 610 S.W.2d 727 (Tenn. App. 1980). We observe initially that decisions of a state's highest court, where applicable, must control over any conflicting opinions of an intermediate state appellate court. We need not rely wholly upon this principle here for, in all events, we find that the facts of the case before us are closer to those of *Vance* than to those of *Harvest Corp.*, and compel our conclusion that the three-year limitations period applied in *Vance* must apply here as well.

The district court relied upon *Harvest Corp.*, which applied the six-year limitations period to a contract action alleging economic injury. In *Harvest Corp.*, the plaintiff corporation sought damages from its accountants, alleging that the defendants' negligence had caused the corporation to overpay when it acquired another company's inventory. The *Harvest* court determined that the plaintiff corporation, which was the *buyer* of property, did not suffer an injury to its personal or real property because at the time the accountants estimated the value of the company to be acquired, the plaintiff corporation did not own the property at issue. "The defendants' alleged breach of contract occurred through their misstatement of said property's value." *Harvest Corp.*, 610 S.W.2d at 730. This allegedly negligent misstatement did not affect the value of property then owned by the plaintiff corporation, so the corporation suffered money damages but not injury to its property.

In *Vance*, however, the Tennessee Supreme Court applied the shorter limitations period to an action in which the plaintiff alleged that the defendants' fraudulent misrepresentations had induced him to *sell* his stock for less than its value. The defendants were corporate directors who understated to a shareholder the value of an outsider's purchase price for the company's assets. The shareholder sold his stock, receiving in return roughly half the money actually paid by the buyer for the shares. The defendant directors allegedly kept the rest of the buyer's payment for themselves. The court concluded that T.C.A. § 28-3-105's three-year limitations period should apply. "We reject the notion that injury to property as contemplated therein is limited to physical injury to property. In our opinion, the loss in value sustained by plaintiff from the alleged tort of fraud and deceit is included within the phrase, 'injuries to personal property'[.]" *Vance*, 547 S.W.2d at 932.

In our case, the Company alleges that its property has been injured economically, in much the same way that the *Vance* plaintiff was injured by selling his stock. All damages claimed by the Company were incurred when it was allegedly forced by the Bank to quickly dispose of unprofitable assets, and was unable to complete the sell-off in a careful and economically beneficial manner. While the intrinsic value of the property sold by the plaintiff in *Vance* and the property sold by the Company in this case may have been unchanged by the actions of the defendants in the two suits, the lost value of the *Vance* plaintiff's stock at the time he sold it was found to be an injury to his property. The same may be said of the allegedly depressed market price obtained by the Company for its assets sold in the early 1980s. In both *Vance* and our own case, a seller contended that he did not receive as much for his stock or assets as he would have absent the defendants' alleged wrongdoing. In Tennessee, actions for injuries to personal or real property must be brought within three years after the alleged damages. The Company's action filed nearly six years after the Bank's demand for payment and allegedly

improper demand for a disposition of some Company assets was time barred.

In Tennessee, "the gravamen of an action, rather than its designation as an action for tort or contract, determines the applicable statute of limitations." *Pera v. Kroger Co.*, 674 S.W.2d 715, 719 (Tenn. 1984). In *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1272 (7th Cir. 1990), the court applied Tennessee's three-year statute of limitations, noting that the "difference between the action brought in *Vance* and that which is presented for our review today is that UST has alleged 'economic duress' rather than 'deceit.' This, however, is a distinction without meaning in the specific context of determining the appropriate limitations period under Tennessee law." In our case, the gravamen of the action was an alleged economic injury to the Company when property was sold at a loss. We agree with the Seventh Circuit that Tennessee's highest court would impose a three-year limitations period on such economic duress claims where the plaintiff seeks damages for alleged injuries to its property.

II.

While we conclude that the statute of limitations defense is complete, and compels reversal as a matter of law, we find a co-equal reason for reversal in our conclusion that the Waiver and Release signed by the Company in July 1983 barred any legal action brought by the Company for alleged liability arising before that date. There seems to be little dispute that the Company's waiver of any right to sue the Bank was supported by consideration, since the Bank signed a similar waiver in favor of the Company, and the Bank extended additional credit to the Company as part of the 1983 negotiations between the parties.

However, the Company contended at trial that it signed the Waiver and Release under economic duress, and therefore should not be bound by its terms. Economic duress has been defined as "imposition, oppression, undue

influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another[.]" *Crocker v. Schneider*, 683 S.W.2d 335, 338 (Tenn. App. 1984) (citation omitted). The alleged coercive event must be of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of ordinary firmness. *Fogg v. Union Bank*, 63 Tenn. [4 Baxter] 530, 535 (1874). While we question the jury's finding that the Company signed the waiver under duress, given the length of time over which the Company's directors and legal counsel considered the issue, we conclude that in any event the Company's failure to repudiate the Waiver and Release until five years after its relationship with the Bank ended now bars any attempt by the Company to avoid the terms of the Waiver as a matter of law.

A contract signed under economic duress is voidable by the victim, not void. Restatement (Second) of Contracts §§ 175 & comment d, 176 & comment a (1981). See *In re McNeil*, 22 B.R. 408, 414 (Bkrtcy. E.D. Tenn. 1982) ("A contract or other instrument is voidable under Tennessee law on the basis of duress. . . ."); *Blair v. Coffman and Blackburn*, 2 Tenn. [2 Overt.] 176, 177 (1812) ("The matter of fact which would invalidate voidable acts must always be pleaded; hence the necessity of this course as to duress."). This is distinguished from duress by physical compulsion, which renders a contract void. No allegations of physical duress have been raised by the Company.

In general, a party seeking to avoid a contract induced by economic duress must act promptly upon removal of the duress to avoid the contract. *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982). In Tennessee, a party who chose to perform under a written agreement for nearly two years was found to have ratified it, and was estopped from claiming economic duress to avoid the agreement's terms. *Crocker v. Schneider*, 683 S.W.2d 335 (Tenn. App. 1984). Generally, where the contract is a Waiver and Release,

the releasor who retains the consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991).

In this case, the Waiver and Release was signed by the Company in 1983. Not until the law suit was filed in 1988 did the Company repudiate the waiver and raise the duress argument. The lending relationship between the Bank and the Company had ended five years earlier. No letter or other document from the Company during those five intervening years suggested that it felt it had been subjected to duress. As noted above, a party who for twenty-two months after the alleged economic duress chose to abide by the terms of his agreement and retain the consideration was thereby estopped from claiming duress under Tennessee law. *Crocker*, 683 S.W.2d at 340. In our case, the Company's five-year failure to take any affirmative steps to repudiate the allegedly voidable contract bars its present argument that the waiver was not effective when the Company finally brought suit against the Bank in 1988.

III.

We conclude that the Company's suit was barred by the applicable Tennessee statute of limitations, as well as by the Waiver and Release which even if voidable, was not timely repudiated. As a result, we need not consider the Bank's further arguments that the Company breached the terms of the loan agreement, or that the district court improperly instructed the jury at trial. The judgment of the district court is REVERSED, and the case remanded for entry of judgment in favor of First American National Bank.

UNITED STATES FOR OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CUMBERLAND & OHIO CO. OF TEXAS, INC., the successor
corporation of Herbert Materials Inc.

Plaintiff - Appellee

v.

FIRST AMERICAN NATIONAL BANK

Defendant - Appellant

BEFORE: KENNEDY AND MARTIN, Circuit Judges; ENGEL, Senior
Circuit Judge

Upon consideration of the appellee's motion to certify questions of
law, and further considering the appellant's response in opposition,
It is **ORDERED** that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[entered July 23, 1991]

UNITED STATES FOR OF APPEALS
FOR THE SIXTH CIRCUIT

CUMBERLAND & OHIO CO. OF TEXAS, INC., the successor
corporation of Herbert Materials Inc.

Plaintiff - Appellee

v.

ORDER

FIRST AMERICAN NATIONAL BANK

Defendant - Appellant

BEFORE: KENNEDY AND MARTIN, Circuit Judges; ENGEL, Senior
Circuit Judge

The court having received a petition for rehearing en banc, and the
petition having been circulated not only to the original panel members but
also to all other active judges of this court, and no judge of this court
having requested a vote on the suggestion for rehearing en banc, the
petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and
concludes that the issues raised in the petition were fully considered upon
the original submission and decision of the case. Accordingly, the petition
is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[entered August 14, 1991]

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CUMBERLAND & OHIO CO.]	
OF TEXAS, INC., the	[
successor corporation]	
of HERBERT MATERIAL	[
INCORPORATED]	
	[
VS.]	DOCKET NO. 3-88-0784
	[
FIRST AMERICAN BANK]	
OF NASHVILLE]	

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that upon the jury's verdict for the plaintiff, compensatory damages are awarded against First American Bank in the amount of \$6,000,000.00

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

September 29, 1989
Date

Juliet Griffin
Clerk

/s/ Mary Conner
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CUMBERLAND & OHIO CO,]
OF TEXAS, INC., the]
successor corporation]
of HERBERT MATERIAL]
INCORPORATED]
VS.	DOCKET NO. 3-88-0784
FIRST AMERICAN BANK]
OF NASHVILLE]

BENCH MEMORANDUM

Defendant First American Bank has presented a motion in limine on the grounds that several of plaintiff's claims are barred by Tennessee's statutes of limitations and evidence relating to those claims is thus irrelevant.

Plaintiff has claimed that it entered into a contract with First American Bank on August 13, 1981 and that First American subsequently breached its contractual and fiduciary duties by failing to perform in good faith and by failing "to give notice of a substantial change in the relationship." Plaintiff has also claimed that the defendant misrepresented facts "affecting the plaintiff in its business." Plaintiff has alleged that as a result of the above acts, plaintiff suffered operating losses and was forced to dispose of inventory and assets at below market prices.

Tennessee Code Annotated section 28-3-109 provides for a six year statute of limitation for "actions on contracts not otherwise expressly provided for" in the code. Among the other statute of limitation provisions within the Tennessee Code, section 23-3-105, expressly provides that "actions for injuries to personal or real property" must be commenced within three years of the cause of action.

In applying these sections, the Tennessee courts have found the six year statute of limitations to be applicable to a claim only if the claim was truly based in contract and not tort, and if the damages alleged were not to persons or property. Thus in Budget Rent-a-Car of Knoxville, Inc. v. Car Services, Inc., 469 S.W.2d 360 (1971), where the plaintiff claimed the tort of conspiracy, the Tennessee Supreme Court applied a three year statute of

limitations, even though plaintiff suffered only monetary, not property damages.

In Williams v. Thompson, 443 S.W.2d 447 (Tenn. 1969), the Supreme Court applied the three year statute of limitations where the action admittedly arose in contract but the damage was done to plaintiff's real property.

In Vance v. Schulder, 547 S.W.2d 927 (1977), the Supreme Court again applied the three year statute of limitations where the plaintiff's monetary damages resulted from the defendant's alleged tort of fraud.

In Harvest Corp. v. Ernst & Whinney, however, the Tennessee Court of Appeals applied the six year statute of limitations where defendants' poor performance of their contractual obligations resulted in the plaintiffs paying an excessive price for a business acquisition. 610 S.W.2d 727 (Tenn. App. 1980), cert. denied (Tenn. Nov. 10, 1980).

In the present case, the plaintiff has alleged that it incurred monetary losses in selling its inventory and assets at below market price. Plaintiff has not alleged that the defendant injured its property, but that defendant's actions forced plaintiff to suffer operating losses and to sell its property under such time pressures that plaintiff received less money than it would have otherwise received for the sale. The inherent value of the property remained the same. As the Court of Appeals found under similar circumstances in Harvest Corp., 'such money damages do not constitute damage to property."

The Court also finds that plaintiff has presented claims lying in contract and not tort. Plaintiff's losses are alleged to have resulted from defendant's allegedly bad faith performance of the contract. Plaintiff has not sought to recover on the ground that defendant's bad faith amounted to conspiracy or fraud, but that defendant's performance breached the contract's implied covenant of good faith. Accordingly, the Court finds that these claims are properly characterized as "actions on contracts" and are thus governed by the six year statute of limitations prescribed in Tennessee Code section 28-3-109.

Plaintiff has also claimed, however, that defendant breached its fiduciary duty. Breach of fiduciary duty is tortious conduct. Restatement of Torts 2d, § 874. Accordingly, plaintiff's breach of fiduciary duty claim is barred by the three year statute of limitations set out in Tennessee Code section 28-3-105, and evidence in support of that claim is thus irrelevant.

The Court notes that the plaintiff has also alleged that the defendant misrepresented facts in their negotiations. Evidence of these misrepresentations may be admitted to prove defendant's alleged bad faith, but will not be admitted to support a claim of fraud in the inducement, since the tort of

fraud is governed by the three year statute of limitations set out in Tennessee Code section 28-3-105.

[filed September 27, 1989]

RULE 23. CERTIFICATION OF QUESTIONS OF STATE LAW FROM FEDERAL COURT

Table of Sections

Section

- 1. When Certified.**
- 2. Method of Invoking Rule.**
- 3. Contents of Certification Order.**
- 4. Preparation of Certification Order, Notice of Filing.**
- 5. Record.**
- 6. Parties.**
- 7. Briefs and Arguments.**
- 8. Opinion.**
- 9. Dismissal of Certification.**
- 10. Costs.**

Section 1. When Certified

The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Section 2. Method of Invoking Rule

This rule may be invoked upon the issuance of a certification order by any of the courts referred to in Section 1 of this rule.

Section 3. Contents of Certification Order

The certification order shall contain:

- (A) The style of the case;
- (B) A statement of facts showing the nature of the case, the circumstances out of which the question of law arises, the question of law to be answered, and any other information the certifying court deems relevant to the question of law to be answered;
- (C) The names of each of the parties;
- (D) The names, addresses, and telephone numbers of counsel for each party; and

(E) A designation of one of the parties as the moving party.

Section 4. Preparation of Certification Order; Notice of Filing

The certification order shall be prepared by the certifying court and signed by any judge or justice presiding over the cause. The clerk of the certifying court shall serve copies of the certification order upon all parties or their counsel of record and file with this Court the certification order, under seal of the certifying court, along with proof of service.

Section 5. Record

This court may require the original or copies of all or any portion of the record before the certifying court.

Section 6. Parties

The party designated by the certifying court as the moving party shall be referred to as the petitioner and the party adverse to the petitioner shall be referred to as the respondent.

Section 7. Briefs and Arguments

(A) The brief of the party designated by the certifying court as the moving party shall be filed and served within twenty days of the filing with the Supreme Court of the certification order. The brief of the adverse party shall be filed within twenty days thereafter, and a reply brief may be filed within ten days thereafter.

(B) Oral arguments will not be permitted unless ordered by the Court, on its own motion or upon application of a party.

Section 8. Opinion

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of this Court to the certifying court and to the parties or their counsel.

Section 9. Dismissal of Certification

If the Court, in the exercise of its discretion declines to answer any or all of the questions of law certified to it, an order of the Court shall be sent to the certifying court and to all parties or their counsel.

Section 10. Costs

Costs incident to the proceedings in the Supreme Court of Tennessee shall be taxed in accordance with the Tennessee Rules of Appellate Procedure.

[Adopted effective February 17, 1989.]

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